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Supreme Court of the United States

October Term, 1966

No. 1183

ROBERT F. URBANO,

Petitioner,

against

FREDERIC SONDERN, JR.,

Respondent,

and

ROBERT F. URBANO,

Petitioner,

against

FAWCETT PUBLICATIONS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR WENDA SONDERN, EXECUTRIX OF THE ESTATE OF RESPONDENT FREDERIC SONDERN, JR., DECEASED, IN OPPOSITION

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April 7, 1967

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Jurisdiction

The Order of Affirmance of the United States Court of Appeals for the Second Circuit is dated November 29, 1966, and was entered by the Clerk of that Court on November 29, 1966. A Petition for Rehearing was denied on December

27, 1966. A Motion to Stay Issuance of Mandate Pending Application for a Writ of Certiorari to the Supreme Court of the United States was denied on December 27, 1966.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

New York Civil Rights Law

"§74. *Privileges in action for libel*

"A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

"This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

Connecticut General Statutes

"Sec. 52-237. *Damages in actions for libel.*

"In any action for a libel the defendant may give proof of intention; and unless the plaintiff proves either malice in fact or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damage as he may have specially alleged and proved."

The text of 28 U.S.C. §1915 is set forth in the Petition at pages 2-3.

Question Presented

Where a libel action has been commenced *in forma pauperis,* and defendant has cross-moved for summary judgment, may the action be dismissed as "frivolous" by the District Court under 28 U.S.C. §1915(d) where:

(a) plaintiff has admitted the facts stated in the allegedly defamatory statement to disinterested witnesses;

(b) plaintiff is presently serving a life sentence for murder committed in the course of robbery;

(c) plaintiff made no demand for retraction and failed to plead special damages;

(d) the allegedly libelous statement was made without malice and was based on a written statement released by an official of the Federal Bureau of Investigation in the course of his official duties; and

(e) plaintiff has abused his privilege of proceeding *in forma pauperis,* having brought at least 13 prior actions, in all of which his claims have either been dismissed or have not yet been adjudicated?

Statement of the Case

This libel action was brought by petitioner in the United States District Court for the District of Connecticut. It is based on an article in the December 1963 issue of "Reader's Digest", written by named respondent Frederic Sondern,

Jr. The article describes a robbery attributed to petitioner and states:

> "His admitted ten bank and two department-store robberies netted him some $200,000." (32a)*

The article nowhere states that Mr. Urbano was convicted of any crime other than the crime for which he is presently serving a life sentence (29a-36a).

The author wrote the article without malice, and has never received a demand for a retraction (A26-A27). The article was based on a report of the Federal Bureau of Investigation (A26). The F.B.I. report was released as an official act of the F.B.I. (A3).

In support of his cross-motion for summary judgment before the District Court defendant author submitted certified copies of the ten confessions signed by plaintiff (A18-A24), affidavits of two F.B.I. agents to whom he made oral confessions (A42-A43), and a certified copy of the opinion of Judge Galanti denying one of Mr. Urbano's applications for a writ of habeas corpus (A34-A41). Judge Galanti's opinion quotes the testimony of two of Mr. Urbano's psychiatric witnesses to whom Mr. Urbano made confessions of his crimes (A37-A38). The opinion also quotes confessions made to two of the State's psychiatric witnesses (A38-A39). The affidavit of Wendell Davis, Jr., submitted in support of defendant's cross-motion, shows that of the 13 or more prior actions commenced by Mr. Urbano, eight were dismissed on the merits, and two other actions were

* Page references to petitioner's appendix on appeal to the United States Court of Appeals for the Second Circuit are indicated by the suffix "a". References to the Executrix's appendix on that appeal are indicated by the prefix "A".

dismissed for lack of jurisdiction (A6-A12). Of the three other actions at least one (*Urbano* v. *Fawcett Publications, Inc.*) has since been dismissed as "frivolous" (Petition Appendix B).

Petitioner is presently serving a life sentence on conviction of murder committed in the course of robbery (A2).

Named respondent Frederic Sondern, Jr. died on or about August 3, 1966 (A47). On October 24, 1966 Wenda Sondern, executrix of his estate, was substituted as defendant by order of the Court of Appeals.

POINT I

The decision below was clearly correct.

The opinion of the District Court dismissing this action as "frivolous" shows that Mr. Urbano has received a full hearing on his claims. The District Court noted that the files in both matters were "voluminous" and that it had a "complete understanding of the claims" and was "satisfied that the actions are frivolous and ought to be dismissed."

Petitioner's position is, apparently, that no one can state that he committed a crime, or even confessed to the crime, until he has actually been convicted of the crime (A45). Even if plaintiff did not actually commit the bank robberies and department store robberies (a hypothesis not supported by the record) it is obvious that a statement that

he admitted commission of the crimes is not actionable where he did, in fact, admit on numerous instances, that he did commit the crimes.

The opinion of the Court of Appeals recognizes the validity in this case of the defense of qualified privilege to report the activities of public officials, in addition to the defense of truth. New York Civil Rights Law §74 confers a privilege for a fair and true report of an official proceeding. This statute has been construed in *Bridgwood* v. *Newspaper PM, Inc.*, 276 App. Div. 858, 93 N.Y.S. 2d 613 (2d Dept. 1949), to cover statements made by prosecuting officials.

Under Connecticut General Statute §52-237 plaintiff can recover nothing unless he affirmatively establishes "malice in fact." The record shows absence of malice (A26-A27), and is barren of any evidence of malice in fact.

The fact that Mr. Urbano had commenced numerous prior frivolous lawsuits was alone sufficient to warrant the District Court's refusal to allow plaintiff to proceed as a poor person under 28 U.S.C. §1915 (*Kinney* v. *Plymouth Rock Squab Co.*, 236 U.S. 43 [1915]).

POINT II

Petitioner has shown no ground for granting certiorari.

The petition shows no conflict between the decision of the Court of Appeals and any other decision of any Court.

Conclusion

For the reasons given it is respectfully submitted that the Petition for a Writ of Certiorari should be denied, with costs to the Executrix.

Respectfully submitted,

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Wenda Sondern, Executrix of Estate
of Respondent Frederic Sondern, Jr.,
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LORD, DAY & LORD

April 7, 1967